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No. 88-1725

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JUAN FRANCISCO VENEGAS,

Petitioner,

VS.

MICHAEL R. MITCHELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent (Mr. Mitchell) raises three issues for the first time which this reply will address. They are the first three sections of the reasons the writ should be denied. The other four alleged reasons are unsound arguments but aimed at the merits of the case. It is inappropriate to address the merits at this time.

I. THE CASE IS RIPE FOR REVIEW

The Court of Appeals had before it the appeal of Mr. Mitchell that his motion to intervene to confirm a lien should have been granted and the appeal of Mr. Venegas from the refusal of the district court to reduce the fee claimed by Mr. Mitchell to the amount the court had previously determined to be the reasonable fee pursuant to §1988.

The part that was remanded to the district court, the motion to intervene to confirm a lien, is now moot. On April 13, 1989, Mr. Mitchell served a "Motion To Determine Attorney's Fees" calendared for May 15, 1989. In that motion Mr. Mitchell told the district court "This Court Has Jurisdiction. The mandate of the court of appeals issues '7 days after the entry of the order denying the petition . . .' F.R.A.P. 41(a) The order denying the petition was entered April 4, 1989. Thus the mandate issued April 11, 1989." In the next two sections of the motion respondent stated "The Court of Appeals remanded for this court to 'determine the merits of Mitchell's motion to confirm a lien . . .' As shown below, events have mooted the need for this court to determine the lien claim. All that remains is for the court to exercise its ancillary jurisdiction to determine attorney fees." The next section goes into the details of the settlement of the *Venegas v Skaggs*, 831 F.2d 1514 (9th Cir. 1987) and the placing in escrow of the $800,000.00 which is the subject of this suit. Mr. Mitchell then requested an order for $839,227 (which was 40% percent of the $2,000,000.00 settlement, plus 40% of the $117,000 §1988 award made to Mr.Venegas, equalling $846,800, minus the $10,000 previously paid by Mr. Venegas, plus $2,427.00 in costs).

Mr. Mitchell was called, by counsel for petitioner, and told that not only did the mandate not issue on April 11, as Mr. Mitchell had represented to the district court, but that the Ninth Circuit had stayed the mandate over Mr. Mitchell's April 14, 1989 objection. Mr. Mitchell withdrew the motion from the court's calendar. However, that withdrawal does not change the fact that the motion to confirm a lien, which Mr. Mitchell tells this Court it should wait to have decided, is moot. Of course, Mr. Venegas' appeal to have the district court reduce the fee was not sent back to the lower court. The lower court refused to reduce Mr. Mitchell's fee to the amount it had previously determined to be reasonable pursuant to §1988 and that determination was affirmed. It is that determinati which is the subject of the Petition for the Writ of Certiorari.

II. THERE IS A TRUE CONFLICT IN THE CIRCUITS.

Mr. Mitchell for the first time denies a conflict in the circuits. In Mr. Mitchell's opening brief in the Ninth Circuit on page 10 Mr. Mitchell has a topic heading "Conflicting Case Law" the section begins:

> "The Tenth Circuit has flatly held that if the Section 1988 fee award is less than the amount owed under a contingent fee agreement, the attorney will be expected to reduce his fee to the amount awarded . . ."

(The same section appears in Mr. Mitchell's reply to Mr. Venegas' opposition to the motion to confirm a lien in the district court. Appellant's Excerpt of Record on Appeal pages 180 to 181.)

In citing *Cooper v. Singer*, 719 F.2d 1496, (10th Cir. 1983) (*en banc*), in both courts below, Mr. Mitchell noted the fact that the case was cited by this Court in *Evans v. Jeff D.*, 475 U.S.717 (1986) in footnote 19 of this Court's opinion. Now, before this Court Mr. Mitchell claims Cooper was "founded on the assumption that the statutory fees belonged to and would be awarded to the attorney" Brief in Opposition p. 4. Mr. Mitchell then claims *Evans* has shown the assumption to be erroneous. This Court cites *Cooper* in footnote 19 of *Evans* for the proposition that the §1988 fee is the client's fee. The footnote cites *Cooper* for "distinguishing between client's and counsel's entitlement to fees in the course of holding that 'if the *client's* section 1988 fee award . . . is less than the amount owed to the attorney under a contingent fee agreement, then the lawyer will be expected to reduce his fee to the amount awarded by the courts.' " (emphasis added by the Supreme Court) 475 U.S. at 730.

Mr. Mitchell next claims that there is no conflict because the Tenth Circuit refused to make *Cooper* retroactive to fee agreements entered into before *Cooper* was decided. However, the fee agreement in the case at bar was entered into after *Cooper*. So, if this case were brought in the Tenth Circuit rather than the Ninth the result would be different. "Cases are properly

regarded as conflicting if it can be said with confidence that another circuit would decide the case differently because of language in an opinion in a case having substantial factual similarity." Stern, Gressman, and Shapiro, *Supreme Court Practice*, Sixth Edition, page 374 (1986).

Mr. Mitchell misconstrues the holding in *Wheatley v. Ford*, 679 F.2d 1037 (2d Cir. 1982) to claim that there is no conflict with the Ninth Circuit's position. However, the Ninth Circuit construed *Wheatley* precisely as Mr. Venegas did. After noting the holding in cases that did not use the contingent fee agreement as a cap on the §1988 fee award, the court in *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985) stated:

> "In contrast, some circuits treat the amount awarded under section 1988 as the ceiling on a fee award, regardless whether recovery under the contingent agreement would be greater. According to the Second Circuit, a claim for services rendered under a contingent fee agreement must be deemed satisfied to the extent counsel receives an award under section 1988. *Wheatley v. Ford*, 679 F.2d 1037, 1041 (2d Cir.1982) * * * The Tenth Circuit recently followed *Wheatley* . . ." (citing *Cooper* as the case that followed *Wheatley*.) 769 F.2d at 1408-1409.

The Ninth Circuit went on to determine that the plaintiff should pay the difference between the reasonable fee under §1988 and the contingent fee out of his damages which is a direct rejection of both *Wheatley* and *Cooper*.

It is inexplicable how Mr. Mitchell can claim *Wheatley* and *Cooper* are not in direct conflict with the holding of the Ninth Circuit herein. The author of the opinion in the case at bar noted the conflict at oral argument in the Ninth Circuit.

The conflict is not only real, but it will not go away with ease. This Court's decision in *Blanchard v. Bergeron*, 109 S. Ct 939 (1989) has the potential to polarize the positions even further. Surely the Second and Tenth Circuits will read the reasoning

of the opinion and the language "Thus it is that a plaintiff's recovery will not be reduced by what he must pay his counsel" 109 S. Ct. at 944, as vindication for their position that Congress intended to reward the private citizen for acting as a private attorney general by allowing them to recover all that it costs to vindicate society's interests. And just as surely the circuits which, like the Ninth Circuit, believe that Congress intended to give incentive to attorneys will, as the Ninth Circuit did in the case at bar, ignore the reasoning and exalt the result that gives more money to attorneys as vindication of their attorney-incentive view of §1988.

III. THE DECISION OF THE NINTH CIRCUIT FAVORING ENFORCEMENT OF MR. MITCHELL'S FEE AGREEMENT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT.

A close analysis of *Blanchard v. Bergeron*, *supra* reveals that enforcement of Mr. Mitchell's fee agreement is not proper under federal law. That case indicates that a common law contingent fee agreement is appropriate where counsel undertakes a case not knowing whether it sounds in civil rights or common law tort. But that is not our case. By the time Mr. Mitchell got this case the common law state court causes of action had already been tried and reversed and were awaiting a new trial in state court. The case Mr. Mitchell had been asked to take had been up to the Ninth Circuit in *Venegas v. Wagner*, 704 F.2d 1144 (9th Cir. 1983) and there was no question it sounded in civil rights. Mr. Mitchell knew or should have known that he could only charge Mr. Venegas a reasonable fee. Mr. Mitchell knew or should have known that in passing the Civil Rights Attorney's Fee Award Act of 1976 Congress provided that the court would award the prevailing party a reasonable fee and order the defendant to pay that fee. Therefore, in this civil rights field, there was no justification for Mr. Mitchell having Mr. Venegas enter into a percentage fee agreement at all. As argued by Mr. Venegas in the Court of Appeals, the sole purpose of the fee agreement in this case was to secure an advantage for Mr. Mitchell at the expense of his client. Had *Blanchard* been decided before argument below it would have been cited as authority along with *Cooper* which the Ninth Circuit felt free to reject.

The decisions of this Court when read together give the view that §1988 means that if plaintiff prevails in a civil rights case, no matter what fee agreement attracted the attorney in the first instance, at the end of the day it will be the court which determines the attorney's reasonable fee.

CONCLUSION

Mr. Mitchell attempts to blind this court to the issues in this case by calling Mr. Venegas a disgruntled client. However, the federal issue, the relationship between a fee awarded under section 1988 and a larger common law contingent fee, is an issue directly effecting the attorney-client relationship in all civil rights cases seeking money damages and indirectly effecting civil rights cases seeking other relief.

Since there is a true conflict in the circuits, and the holding in the Ninth Circuit conflicts with the reasoning of this Court's precedents on so fundamentally important an issue, it is respectfully suggested that it is time for this Court to resolve the conflict so that all civil rights plaintiffs can keep all of their monetary damages in all of the circuits.

Respectfully Submitted,

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